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**In The
Supreme Court of the United States**

**CHARLIE D. BROWN, as Trustee of the
Katelyn Andrews Segregated Settlement Account,**

Petitioner,

v.

**NORTH CAROLINA DEPARTMENT OF
HEALTH AND HUMAN SERVICES,**

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA**

**BRIEF OF NORTH CAROLINA
ADVOCATES FOR JUSTICE AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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The North Carolina Advocates for Justice ("NCAJ"), pursuant to Rule 37.2(a), hereby files this brief as *amicus curiae* in support of the Petition for a Writ of Certiorari.¹ Counsel of record for all parties were notified more than 10 days ago of NCAJ's intention to file this brief. All parties consented in writing to the filing of this brief and the written consents were filed with the Clerk.

INTEREST OF THE *AMICUS CURIAE*

NCAJ is a voluntary association of more than 3,500 North Carolina attorneys, many of whom represent individual plaintiffs in personal injury actions. Many of the injured plaintiffs represented by NCAJ members have received, or will receive, medical treatment paid by Medicaid. As a result, NCAJ members and their clients are directly affected by the construction of statutory provisions in the federal Medicaid Act concerning the repayment of medical expenses to Respondent, North Carolina's Medicaid agency, out of proceeds obtained from liable third parties.

When an injured plaintiff in North Carolina obtains a settlement following the payment of medical costs by Medicaid, North Carolina law automatically imposes a lien on the settlement in an amount equal to Medicaid's costs. Respondent is

¹ Pursuant to Rule 37.6, NCAJ discloses that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than NCAJ, its members, or its counsel, made a monetary contribution to its preparation or submission.

entitled to recover the Medicaid lien provided that the amount does not exceed one-third of the total settlement. N.C. Gen. Stat. § 108A-57(a) (2005). In this case, the North Carolina Supreme Court held that the one-third limiting provision in N.C. Gen. Stat. § 108A-57(a) complies with federal Medicaid law and, in the absence of a verdict or stipulation, conclusively establishes the amount of a settlement attributable to past medical expenses. A judicial hearing to allocate the medical expenses from a settlement is thus not required when the plaintiff contends that Respondent's asserted lien exceeds the amount properly allocated for medical expenses. *Andrews, ex rel. Andrews v. Haygood*, 362 N.C. 599, 601-04, 669 S.E.2d 310, 312-14 (2008) (App. 3a-9a).²

The North Carolina Supreme Court's opinion precludes judicial review in circumstances when Respondent imposes a Medicaid lien upon the portion of settlement proceeds meant to compensate an injured plaintiff for damages distinct from past medical costs – like pain and suffering, disfigurement, and permanent injury. Without judicial review, Respondent may improperly assert a lien upon a plaintiff's settlement in violation of 42 U.S.C. § 1396a(a)(25) and 42 U.S.C. § 1396k(a) as well as the Medicaid anti-lien provision codified at 42 U.S.C. § 1396p(a). See *Arkansas Dep't of Health and Human Serv. v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752 (2006) (holding that a state agency is not authorized to assert a Medicaid lien on a tort settlement that exceeds the compensation for past medical expenses). In order to comply with federal

² "App." refers to the Appendix to the Petition for a Writ of Certiorari.

Medicaid law, as articulated by this Court in *Ahlborn*, an injured plaintiff must be allowed an evidentiary hearing in order to rebut the medical expense presumption contained in N.C. Gen. Stat. § 108A-57.

SUMMARY OF THE ARGUMENT

The Petition for a Writ of Certiorari should be granted for two reasons. First, the North Carolina Supreme Court's opinion conflicts with this Court's opinion in *Arkansas Dep't Of Health And Human Serv. v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752 (2006) because it allows Respondent to recover its Medicaid lien from settlement proceeds meant to compensate an injured plaintiff (like Katelyn Andrews) for damages distinct from past medical costs. The North Carolina Supreme Court's opinion creates a mandatory presumption, not subject to judicial review, that up to one-third of every tort settlement involving a Medicaid recipient includes compensation for all of the medical expenses paid by Respondent. *Andrews*, 362 N.C. at 314, 669 S.E.2d at 604 (App. 8a-9a). The mandatory presumption applies to personal injury claims that are significantly compromised as well as claims that are settled for full value. The North Carolina Supreme Court's opinion improperly authorizes Respondent to always recover 100% of its Medicaid lien, subject to one-third of the gross settlement, even when this amount exceeds the past medical expenses recovered by the plaintiff.

Second, a definition of the rules and procedures that a state must follow to ensure

compliance with *Ahlborn* is an important question of federal law that has not been, but should be, settled by this Court. The North Carolina Supreme Court's opinion holds that the one-third limitation in N.C. Gen. Stat. § 108A-57(a) conclusively establishes the amount of medical expenses in a settlement and "comports with *Ahlborn* by providing a reasonable method for determining the State's medical reimbursements, which it is required to seek in accordance with federal Medicaid law." *Andrews*, 362 N.C. at 604, 669 S.E.2d at 314 (App. 8a-9a). According to the North Carolina Supreme Court, a hearing to allocate the medical expenses in a settlement is unnecessary in light of N.C. Gen. Stat. § 108A-57(a). *Id.*, 362 N.C. at 600-04, 669 S.E.2d at 311-14 (App. 1a-9a). The North Carolina Supreme Court's holding that a statutory presumption, not subject to judicial review, ensures Respondent's compliance with *Ahlborn* raises an important question of federal Medicaid law that should be settled by this Court. This Court should grant the Petition for a Writ of Certiorari to give concrete guidance to the states about how to recover Medicaid payments in accordance with *Ahlborn*.

ARGUMENT

I. The Petition for a Writ of Certiorari Should Be Granted Because the Opinion of the North Carolina Supreme Court Conflicts with this Court's Opinion in *Arkansas Dep't Of Health And Human Serv. v. Ahlborn*.

In *Ahlborn*, this Court granted certiorari to resolve a conflict between the state and federal courts of appeal about whether a state may satisfy its Medicaid lien "out of proceeds meant to compensate the recipient for damages distinct from medical costs - like pain and suffering, lost wages, and loss of future earnings." *Ahlborn*, 547 U.S. at 272, 126 S. Ct. at 1756. After an extensive review of the federal Medicaid third party recovery laws (42 U.S.C. § 1396a(25) and 42 U.S.C. § 1396k(a)), the Court issued a unanimous opinion holding that a state agency is not authorized to assert a Medicaid lien on a recipient's tort settlement in an amount that exceeds the compensation for medical expenses and the "federal anti-lien provision [42 U.S.C. § 1396p] affirmatively prohibits it from doing so." *Id.*, 547 U.S. at 292, 126 S. Ct. at 1767. Under *Ahlborn*, when a Medicaid recipient (like Katelyn Andrews) is compelled to settle her case for less than the full value of all her damages, the burden is shared equitably between the recipient and the state.

In this case, Katelyn Andrews ("Katelyn") substantially compromised her claim for medical malpractice. Despite the compromise, Respondent insisted that it was entitled to recover all of its

Medicaid payments from Katelyn's settlement because this amount did not exceed one-third of the gross recovery. Petitioner disagreed and requested a court hearing to present evidence demonstrating that the compensation Katelyn received for past medical expenses was significantly less than Respondent's Medicaid lien. The trial court refused the hearing and allowed Respondent to recover 100% of its Medicaid payments from Katelyn's settlement without any proof that it was taking compensation only for past medical expenses. (App. 40a-41a).

The North Carolina Supreme Court affirmed the denial of a court hearing on the basis that N.C. Gen. Stat. § 108A-57(a) "defines the portion of the settlement that represents payment for medical expenses' as the lesser of the State's past medical expenditures or one-third of the plaintiff's total recovery...." *Andrews*, 362 N.C. at 604, 669 S.E.2d at 314 (*citations omitted*) (App. 8a). According to the North Carolina Supreme Court, because Respondent's Medicaid lien did not exceed one-third of Katelyn's settlement, a hearing was unnecessary and Respondent was entitled to recover all of its Medicaid payments. *Id.*, 362 N.C. at 601-04, 669 S.E.2d at 312-14 (App. 3a-9a).

The North Carolina Supreme Court's opinion conflicts with this Court's opinion in *Ahlborn*. Rather than analyzing Petitioner's case on the merits, the North Carolina Supreme Court conclusively presumes, contrary to the evidence in the record of a compromise recovery, that Katelyn's settlement includes 100% of Respondent's Medicaid payments. The North Carolina Supreme Court

establishes a rule that Respondent is always entitled to complete recovery, subject to the one-third statutory limitation, in spite of this Court's admonition in *Ahlborn* that "a rule of absolute priority might preclude settlement in a large number of cases, and be unfair to the recipient in others." *Ahlborn*, 547 U.S. at 288, 126 S. Ct. at 1765. A rule that authorizes Respondent the absolute right to recover up to one-third of every settlement in satisfaction of its Medicaid lien, without judicial review, violates this Court's opinion in *Ahlborn*. This Court should grant the Petition for a Writ of Certiorari to address the conflict created by the North Carolina Supreme Court's opinion.

II. The Petition for a Writ of Certiorari Should Be Granted Because the Opinion of the North Carolina Supreme Court Resolves an Important Question of Federal Law that Has Not Been, but Should Be, Decided by this Court - What Rules and Procedures Must a State Employ to Ensure Compliance with *Ahlborn*.

In a footnote in *Ahlborn*, this Court observed that "some States have adopted special rules and procedures for allocating tort settlements.... Although we express no view on the matter, we leave open the possibility that such rules and procedures might be employed to meet concerns about settlement manipulation." *Ahlborn*, 547 U.S. at 288 n. 18, 126 S. Ct. at 1765 n. 18. The North Carolina Supreme Court interpreted this footnote to mean that *Ahlborn* "does not mandate a judicial

determination of the portion of a settlement from which the State may be reimbursed for prior medical expenditures. Instead, the Supreme Court left to the States the decision on the measures to employ in the operation of their Medicaid programs." *Andrews*, 362 N.C. at 603, 669 S.E.2d at 313 (App. 7a); accord *State Dep't of Health and Welfare v. Hudelson*, 146 Idaho 439, ___, 196 P.3d 905, 911 (2008) (stating "*Ahlborn* does not prohibit states from implementing procedures on how to allocate unallocated settlements").

In the absence of authority from this Court, the North Carolina Supreme Court held that a hearing to determine the medical expense portion of a settlement is unnecessary because:

Our state law defines "the portion of the settlement that represents payment for medical expenses" as the lesser of the State's past medical expenditures or one-third of the plaintiffs' total recovery, limiting the State's reimbursement to the portion so designated. The one-third limitation of section 108A-57(a) thus comports with *Ahlborn* by providing a reasonable method for determining the State's medical reimbursements, which it is required to seek in accordance with federal Medicaid law.

Andrews, 362 N.C. at 604, 669 S.E.2d at 313-14 (internal citations omitted) (8a-9a). The North Carolina Supreme Court's opinion endorses the use

of an irrebuttable presumption that a Medicaid recipient's tort settlement always includes the full amount of the medical expenses paid by Respondent up to one-third of the total recovery. The presumption excludes the possibility that the portion of the settlement attributable to Medicaid payments is considerably less than the asserted lien. The mandatory presumption may not be rebutted by the injured plaintiff and judicial review is not permitted.

The North Carolina Supreme Court's opinion addresses an important question of federal Medicaid law that has not been, but should be, settled by this Court:

What rules and procedures must a state employ to ensure compliance with *Ahlborn* in its recovery of Medicaid payments from an injured plaintiff's settlement?

This Court should grant the Petition for a Writ of Certiorari to address this important, but unresolved, question of federal law. If the Petition is granted, NCAJ will argue that N.C. Gen. Stat. § 108A-57(a), as interpreted by the North Carolina Supreme Court, inadequately protects an injured plaintiff from overreaching by Respondent. In order to be valid, a statutory presumption must be accompanied by rules and procedures that permit an injured plaintiff to rebut the presumption in a judicial hearing that comports with the dictates of due process.

CONCLUSION

For the foregoing reasons, and the reasons stated by the Petitioner, NCAJ requests that the Court issue an Order granting the Petition for a Writ of Certiorari.

Respectfully submitted,

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